

**KHOO SIEW BEE & ANOR. v.
KETUA POLIS, KUALA LUMPUR**

[A.Cr.J. (Suffian L.P.) November 20, 1978 and January 5, 1979]
[Kuala Lumpur — Federal Territory Criminal Application
No. 28 of 1978]

Criminal Law and Procedure — Cautioned statements — Application that accused be supplied with copies of their cautioned statements — Whether accused entitled to have copies of their cautioned statements — Whether public documents — Whether accused entitled to inspect documents, — Specific Relief Act, 1950 (Act 137), s. 44(1) — Evidence Act, 1950, ss. 74 and 75 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 107, 108A, 112 and 113.

Evidence — Whether cautioned statements public documents — Whether accused entitled to copies of their cautioned statements — Criminal Procedure Code (F.M.S. Cap. 6), ss. 107, 108A, 112 and 113 — Evidence Act, 1950, ss. 74 and 76.

The applicants had been jointly charged with an offence under the Dangerous Drugs Ordinance, 1952. Before being charged each of them had made cautioned statements to the Police under section 113 of the Criminal Procedure Code. Counsel for the applicants applied to the President Sessions Court for a certified copy of the cautioned statements but the learned President made no order and advised the applicants to apply to the High Court for a ruling. Subsequently their counsel wrote to the respondent, the Ketua Polis, Kuala Lumpur, asking for copies of the cautioned statements but the respondent refused to supply the copies. The applicants then applied for an order pursuant to section 44(1) of the Specific Relief Act, 1950, that the respondent supply them with copies of the cautioned statements.

Held: (1) the police officer who recorded the cautioned statements was under a duty to record them and therefore they were public documents;

(2) the accused has an interest in the cautioned statements recorded from him and has the right to inspect it and to a certified copy before the commencement of the trial;

(3) there should therefore be an order that the respondent supply the applicants a certified copy of the cautioned statements made by each of them to the police under section 113 of the Criminal Procedure Code on payment of such fees as may be payable.

Cases referred to:-

- (1) *Isab Mandal v. Queen-Empress* I.L.R. 28 Cal. 348.
- (2) *Sunil Kumar Datta & Ors. v. State of West Bengal* A.I.R. 1963 Cal. 431.
- (3) *State of Madras v. G. Krishnan* A.I.R. 1961 Mad. 92.
- (4) *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 M.L.J. 24.
- (5) *Bryant and Dickson* (1946) 31 Cr. App. 146.

The following cases were also cited as the hearing:
Martin Rheinus v. Sher Singh [1949] M.L.J. 201; *Public Prosecutor v. Zakaria bin Isa* [1978] 2 M.L.J. 35; *Mahadeo v. R.* [1936] 2 All E.R. 813 P.C.; *Mahesan v. Public Prosecutor* [1970] 1 M.L.J. 255; *Law Thim Wah v. Public Prosecutor* [1978] 1 M.L.J. 167; *Lim Yow Choon v. Public Prosecutor* [1972] 1 M.L.J. 205.

CRIMINAL APPLICATION.

Joginder Singh for the appellants.

Mah Weng Kwai (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult. I

Suffian L.P.: I am dealing with this matter sitting in the High Court.

The applicants were and are jointly charged in Kuala Lumpur Sessions Court Case MSA No. 1460 of 1977 with an offence under section 12(2) and punishable under section 12(3) read together with sec-

A tion 39(A) of the Dangerous Drugs Ordinance No. 30 of 1952.

Before being charged, each of them had made a "cautioned statement" to the Police under section 113 of the Criminal Procedure Code.

B On September 28, 1978, their counsel Mr. Joginder Singh applied to the President, Sessions Court, for an order that the Prosecutor supply him a certified copy of the cautioned statements of the applicants. The learned President made no order and advised the applicants to apply to the High Court for a ruling.

C On September 29, 1978, Mr. Joginder Singh wrote to the Ketua Polis, Federal Territory of Kuala Lumpur, respondent, asking for copies of the cautioned statements "so that our counsel could prepare our defence to the said charges".

The respondent refused to supply the copies. His letter dated October 6, 1978, stated:

"As you are aware, the question of supplying the cautioned statements has been argued in court when the learned President advised that reference be made to the High Court for its ruling. Hence we are unable to supply the cautioned statements as required."

D By notice of motion dated October 24, 1978, the applicants applied for an order pursuant to section 44(1) of the Specific Relief Act, 1950 (Act 137) that the respondent supply them copies of the cautioned statements.

E There is no doubt that if during the trial the prosecution seeks to introduce them in evidence, defence counsel would then in fairness be given copies or the opportunity of making copies, and a brief adjournment to take instructions. There is also no doubt that if the prosecution elects not to introduce them in evidence, defence counsel may do it, when cross-examining the police officer who recorded the statements and by getting him to produce them in evidence (as defence exhibits) — in which case, again defence counsel would be given copies or an opportunity of making copies and a brief adjournment to take instructions.

But the question is: are the accused entitled to copies before the commencement of the trial?

Section 76 of the Evidence Act provides:

"76. Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorized by law to make use of a seal, and the copies as certified shall be called certified copies.

Explanation — Any officer who by the ordinary course of official duty is authorized to deliver the copies shall be deemed to have the custody of the documents within the meaning of this section."

From the above it is clear that every public officer having the custody of a document must give a certified copy of it provided that:

- (1) the document is a public document; and
- (2) the person who asks for a copy has a right to inspect it.

Section 74 of the Evidence Act defines public documents as —

- “(a) documents forming the acts or records of the acts of —
 (i) the sovereign authority;
 (ii) official bodies and tribunals; and
 (iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; . . .”

The first question is: are these cautioned statements public documents? Mr. Mah submitted that a cautioned statement is not a public document and in support he cited this passage:

“The record of a statement of a witness made by a public officer in the course of investigation is not a public document. . . .”

from *Woodroffe and Ameer Ali's Law of Evidence*, 13th edition, volume 2, page 1657, and the two cases in footnote 9, namely, *Isab Mandal v. Queen-Empress*⁽¹⁾ and *Sunil Kumar v. State of West Bengal*.⁽²⁾

With respect I do not think that *Isab* decided as reported by the learned authors. There the accused made two inconsistent statements, first to a Sub-Inspector and then to a Deputy Magistrate, and he was convicted of an offence under section 193 of the Penal Code of intentionally giving false evidence in a judicial proceeding, and there was no question of the accused asking for an advance copy of either statement.

In *Sunil*⁽²⁾ statements were recorded by an Excise Officer from the accused, and the latter asked for copies before the trial commenced, and it was held that they were not entitled to the same. In the course of delivering the judgment of the court Sen J. said at page 433:

“A statement recorded by a Police Officer in the course of the investigation or by an Excise Officer in the course of investigation is not a public document within the meaning of section 74 of the Evidence Act, as held in *Isab Mandal v. Queen-Empress*. . . . Accordingly the question of grant of certified copies does not arise.”

With respect I do not think that the learned judge was right in relying on *Isab*⁽¹⁾ for the proposition stated by him.

With respect I would prefer to follow *State of Madras v. G. Krishnan*⁽³⁾ which held that a confession made by an accused during the course of a police investigation to a magistrate is a public document because it formed the act or record of the act of a judicial officer who was under a duty to record the statement. Here too the police officer who recorded the cautioned statements of the accused was under a duty to record them and therefore they were public documents.

The next question is whether the two accused have a right to inspect these statements within section 74 of the Evidence Act. As to this, in *Krishnan*⁽³⁾ Ramachandra Iyer J. said in paragraph (16) at page 96: “Section 76 [of the Indian Evidence Act] in terms entitles a

A person, who has a right to inspect a public document, to a certified copy thereof. The section, however, does not specify the persons who would be entitled to inspect a public document. But judicial decisions have long ago settled that question. It has been held that the right to inspect a public document is correlated to the interest which the person who seeks inspection has in the document. That interest should be a direct and tangible one in the document; a mere curiosity or even an interest in some other matter which could perhaps be better served by the inspection, would not be sufficient.”

B Dealing with the facts, the learned judge held that the accused therein had an interest in the confession recorded from him and a right to inspect it and therefore is entitled to a certified copy. He said at page 99 in paragraph (24):

C “To entitle the [accused] to the certified copy of [the confession], he should show that he is interested in the document. In the present case, the investigation is still proceeding; no charge-sheet has been filed. It cannot be predicted with certainty that the [accused] will be ultimately charged.

D Can it be said for that reason that his interest is not a direct one but merely hypothetical? We are of opinion that it is not so. The [accused] is kept in remand and that itself would be sufficient to show that he has a substantial interest in the statements or confessions which presumably have implicated him. If the question of the [accused's] right to the grant of the copies has to be decided purely on sections 74 and 76 of the Evidence Act, there can be no doubt that he would be entitled to it.”

The principle decided in *Krishnan*⁽³⁾ was followed by the Federal Court in *Anthony Gomez v. Ketua Polis Daerah Kuantan*⁽⁴⁾ in regard to a first information report lodged by a complainant against an accused, and, with respect, I would hold that it should also be followed in regard to a cautioned statement recorded from an accused person, so that he has an interest in it, has the right to inspect it and to a certified copy before the commencement of the trial especially as here the accused have been brought to court and charged. Accordingly there shall be an order in terms of the motion that the respondent supply the applicants a certified copy of the cautioned statement made by each of them to the police under section 113 of the Criminal Procedure Code on payment of such fees as may be payable.

G I do not think that my ruling is unfair. The cautioned statements have been made by the accused themselves (not by others implicating the accused), and so there is no fear of the accused tampering with potential witnesses who have given information against them. Also, the statements have been signed by the accused (section 112(v), Criminal Procedure Code), and so it will be difficult for them to depart radically from what has been recorded.

H Be it noted that my ruling only applies to statements recorded from the accused, not from others who are potential witnesses against or for them — as to which the prosecution is under no duty to supply to the defence, *Bryant and Dickson*.⁽⁵⁾

I Order accordingly.
 Solicitors: Joginder Singh & Co.